NO. 81-2240

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA and
ROBERT G. BRITTON,
COMMISSIONER,

Petitioners,

V.

DANNY RAY MYLER a/k/a
DANNY RAY MILES,

Respondent

RESPONDENT'S
BRIEF IN OPPOSITION TO PETITION FOR
A WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

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Attorney for Respondent

QUESTION PRESENTED

Whether the failure to file a brief in a nonfrivolous criminal appeal falls below the standard of competency expected and required of counsel, in violation of the accused's right to effective assistance of counsel?

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STATEMENT OF THE CASE

Petitioners (hereinafter referred to jointly as "Alabama") correctly note that Respondent (hereinafter referred to as "Mylar") raised in his petition for a writ of habeas corpus numerous claims in addition to the claim of ineffective assistance of counsel on appeal, but Alabama incorrectly states that these other claims "were decided against him in the Courts below . . ." (Pet. 6). While the other issues were decided against Mylar by the United States District Court, on appeal the Eleventh Circuit Court of Appeals never reached the other issues, stating:

> Upon this review, we reach only the claim of ineffective assistance of counsel.

(App. 92).

The issues which were not reached by the Eleventh Circuit were very serious issues which Mylar had urged the Eleventh Circuit to consider because they concerned constitutional errors in his state court trial. Those issues, for example, included whether (1) admission of out-of-court statements of a key witness violated Mylar's rights under the confrontation clause of the Sixth Amendment, (2) admission of the statements violated Mylar's rights to due process of law, and (3) Mylar's counsel's failure to request on evidentiary hearing on the voluntariness of those statements, to determine reliability for purposes of the Sixth Amendment Confrontation Clause, constituted ineffective assistance of counsel. Mylar had called to the federal court's attention that the state court, in a

different proceeding, had ruled that the challenged testimony had been coerced; Mylar argued that the coercion and other factors made the testimony unreliable and its admission violated his right to confront the witness.

These very serious issues were not reached by the Eleventh Circuit apparently because the Circuit Court felt that they should be argued on the out-of-time appeal from the state court conviction which the Circuit Court ordered be held. While the Eleventh Circuit's failure to reach these other issues was disappointing to Mylar, that failure in no way suggests that the issues are frivolous. To the contrary, the Eleventh Circuit's determination that there were nonfrivolous issues to be considered on appeal from the state court conviction is implicit in its holding:

> We hold that the failure to file a brief in a nonfrivolous appeal falls below the standard of competency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance.

(Appendix 97).

That Mylar had nonfrivolous issues to argue on appeal -- issues which have not yet been considered by the federal courts though raised in Mylar's petition for habeas corpus -- is significant because it contradicts Alabama's claim that Mylar could not have been prejudiced by his counsel's failure to file a brief.

STATEMENT OF FACTS

The Petition incorrectly argues that Mylar's counsel failed to file a brief on appeal from his state court conviction as a matter of strategy. This contention is pure theory and totally without support in the record. Mylar had maintained in his petition for habeas corpus that he was surprised when he learned that his counsel had not filed a brief. There is absolutely no evidence that Mylar's counsel made any deliberate tactical decision not to file a brief or that they communicated such a decision to Mylar.

SUMMARY OF THE ARGUMENT

The decision below falls squarely within the holding in Anders v. California, 386 U.S. 738 (1967). Petitioners are incorrect in suggesting that Anders is an aberration that this Court should reconcile with other precedent, as Anders is not inconsistent with any other decision of this Court.

Petitioners are also incorrect in suggesting that the decision below conflicts with decisions of other Circuits which condition habeas corpus relief upon some showing of prejudice. The Eleventh Circuit here found that an accused is in fact prejudiced when his counsel does not act as an advocate and, further, that Mylar's counsel prejudiced Mylar by not filing a brief when there were nonfrivolous issues to be argued.

ARGUMENT

I. There is No Conflict among the Decisions of the United States Supreme Court

There is no inconsistency among cases decided by this Court which requires this Court's attention, as Alabama contends. Alabama has not cited one case's holding, or even dicta in one case, which is contrary to another case's holding or dicta, because there is none.

Alabama argues that the Supreme Court "created a whole body of law on how a criminal appellant's lawyer must handle a state appeal of a state conviction" when it decided Anders v. California, 386 U.S. 738 (1967) and Entsminger v. Iowa, 386 U.S. 748 (1967) because those cases allegedly departed from the equal protection approach of prior Supreme Court cases and allegedly the state's only constitutional obligation on appeal is to assure equal protection to the accused. Alabama's argument is based upon a number of false assumptions.

First, assuming arguendo that Anders and Entsminger extended prior law by recognizing rights of an accused in addition to the right to equal protection, those cases nevertheless do not conflict with any other cases decided by this Court. Although Alabama argues that the only constitutional right applicable to a criminal appeal is the right to equal protection, Alabama cites no authority for that proposition. To our

knowledge, no Supreme Court case prior or subsequent to Anders and Entsminger has ever made such a declaration, or indeed any other declaration which could be construed as inconsistent with those cases.

Second, Anders and Entsminger in fact discuss the issues presented in terms of equal protection, as well as the Sixth Amendment. In Anders, where the accused was denied the assistance of a court-appointed counsel on appeal, this Court stated:

> The constitutional requirement of substantial equality and fair process can only be obtained where counsel acts in the role of an active advocate.... [I]f [the Court] finds any of the legal points arguable on their merits ... it must, prior to decision afford the indigent the assistance of counsel to argue the appeal.
>
> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a nonindigent defendant is able to obtain.

386 Id. at 744 (emphasis added). While this Court also referred to the Sixth Amendment, it explained that the Sixth Amendment requires the states to assure equal treatment to indigents:

> In Gideon v. Wainwright, 372 U.S. 335 ... (1963), the Sixth Amendment ... was made obligatory on the States by the Fourteenth Amendment, the Court holding that "in our adversary system of criminal justice, any person haled into court, who is too poor to hire a lawyer, cannot be assured of a fair trial unless counsel is provided for him." ... We continue to adhere to these principles.

Third, Alabama misstates the issue when it claims that its only obligation is to assure equal protection in criminal appeals. The issue, rather, is whether the accused has been deprived of his right to the assistance of counsel. Apparently Alabama believes that the constitutional rights of an indigent accused are automatically satisfied as long as an attorney has been appointed to represent him, because the state has given to him the same access to counsel which the non-indigent accused has. Yet, if the appointed attorney does nothing to assist the accused, it could hardly be said that the accused received the "asistance of counsel" as guaranteed by the Sixth Amendment. The State complains that it cannot force an attorney to provide assistance and that its duty is met when it appoints the attorney. If the State's argument were accepted, and if the mere appointment of counsel were held to satisfy an accused's Sixth Amendment rights, then the State could be free to make a mockery of those rights by merely appointing attorneys and by proceeding with the case, including trial, even when the appointed attorneys fail to appear to represent the accused. The Sixth Amendment means nothing if it does not mean that an accused is entitled to counsel's actual assistance, in the role of an advocate.

The State's argument (that it has satisfied its duty by simply appointing counsel and that habeas corpus relief should not be granted when appointed counsel fails to provide assistance since that failure is beyond the State's control) is basically the same argument which this Court rejected in Cuyler v. Sullivan, 446 U.S. 335 (1980). In Cuyler, this Court held that "the Sixth Amendment right to counsel does more than require the States to

appoint counsel for indigent defendants. The right to counsel prevents the States from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance . . . [T]he State's conduct of a criminal trial itself implicate the State in the defendant's conviction . . ." Id. at 344.

Thus, according to Cuyler, the State's duty under the Sixth Amendment prevents it from conducting a criminal proceeding when the defendant's counsel (whether retained or court-appointed) does not provide adequate legal assistance. That duty extends to appeals where the right to the effective assistance of counsel has been recognized.

Mr. Mylar never received the assistance of counsel on appeal, a right recognized squarely by this Court. There is no need, as Alabama claims, for this Court "to clarify the holdings in Anders and Entsminger so as to make them consistent with both prior and subsequent opinions" (Pet. 21). To the contrary, Anders and Entsminger are very clear and quite consistent with other decisions rendered by this Court. Moreover, the decision by the Eleventh Circuit in this case is squarely supported by Anders.

II. The Decision Below Did Not Conflict With Anders or Any Other Decision of this Court.

Alabama's second argument is that Anders and Entsminger

merely require that an indigent appellant be provided with an advocate, that Mylar was provided with an advocate and that, accordingly, the decision below was incorrectly decided. (Pet. 21-27, 37-42). The argument is wrong because Mylar's counsel did not act as an advocate.

Alabama boldly asserts that Mylar's counsel failed to file a brief on appeal as a matter of strategy and this Court refused to grant federal habeas corpus relief from strategy decisions of counsel (Pet. 41). Apart from the fact that the record does not support Alabama's argument that counsel made a deliberate tactical decision in not filing a brief, the case Alabama cites, Estelle v. Williams, 425 U.S. 501 (1976) does not support its argument. Estelle did not sanction "strategy" decisions of counsel which otherwise constitute ineffective assistance of counsel, and in fact had nothing to do with the right to counsel. Rather, in Estelle the Court merely refused to accept the petitioner's claim that he was compelled to stand trial in prison garb when his counsel made no objection at trial. The constitutional right at issue in Estelle was a prisoner's right not to be compelled to stand trial in prison garb, whereas here, the issue is the accused's right to assistance of counsel on appeal. It would be ludicrous to condition federal habeas corpus relief, where the right to counsel is the basis for relief, upon the counsel's failure to object to his own ineffectiveness. The holding in Estelle has no application here.

The issue is not whether the failure to file a brief was a strategy decision, but rather it is whether the failure -- deliberate or not --

was outside the "range of competency" required of counsel on appeal. The right to counsel is the right to effective assistance of counsel, and that right is violated when counsel's actions, including strategy decisions, are incompetent. See McMann v. Richardson, 397 U.S. 759, 771 & n.14 (1970).

The Eleventh Circuit simply held that "the failure to file a brief in a nonfrivolous appeal falls below the standard of competency expected and required of counsel in criminal cases and therefore constitutes ineffective assistance" (Appendix 97). Where there are nonfrivolous issues to be considered, an accused is entitled, as a constitutional minimum, to counsel's assistance in calling those issues to the appellate court's attention, and in arguing those issues as an advocate. Anders, supra. Mylar had serious issues to raise on appeal -- issues concerning, inter alia, the admission of a key witness' testimony from a different proceeding without the necessary showing of the witness' unavailability and of his testimony's reliability.

In conclusion, we know of no decision of this Court which has held that a state court conviction cannot be challenged on the basis of ineffective assistance of counsel where the counsel's ineffectiveness was the result of a deliberate (though incompetent) decision. Thus, the decision below is not contrary to any decisions of this Court and is, rather, entirely consistent with Anders.

III. There is No Conflict Among the Circuits.

Alabama argues that the Eleventh Circuit decision here conflicts with decisions of other circuits which have required some showing of prejudice as a condition for granting habeas corpus relief. There is no conflict because the decision below was limited to nonfrivolous appeals (Appendix 88). Mylar's state court conviction, based upon out-of-court testimony which had been ruled involuntary in another proceeding and which Mylar claims was unreliable, in fact gave rise to nonfrivolous issues regarding the admissibility of that testimony.

Since Mylar was deprived of counsel's assistance in arguing these issues to the state appellate court, he was deprived of the advocacy required by Anders:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client .... His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses. . . .
>
> . . . .This requirement . . . would . . . induce the court to pursue all the more vigorously its own review because of the references not only to the record, but also to the legal authorities as furnished it by counsel.

Anders, supra, 386 U.S. at 744-45.

According to Anders, if Mylar's counsel in fact believed the appeal to be "wholly frivolous," he was obligated to advise the court and to file a brief on any nonfrivolous issues. Mylar's counsel did not take that action and there is no indication that he considered the appeal frivolous. Mylar in fact had issues to be argued on appeal which were not frivolous, as recognized by the Eleventh Circuit.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

Linda Friedman

Linda Friedman

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205) 252-4500

CERTIFICATE OF SERVICE

I, Linda Friedman, a member of the Bar of the Supreme Court of the United States and attorney for Respondent, do hereby certify that on the 7th day of July, 1982 I did serve one copy of the foregoing brief on

the attorney for Petitioner by mailing same, first class postage prepaid and addressed as follows:

Hon. Joseph G. L. Marston, III,
Assistant Attorney General
Office of the Attorney General
250 Administrative Building
64 North Union Street
Montgomery, Alabama 36130

Linda Friedman

Linda Friedman

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No. 81-2240

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1981

STATE OF ALABAMA AND
ROBERT G. BRITTON, COMMISSIONER

Petitioners,

v.

DANNY RAY MYLAR, A/K/A
DANNY RAY MILES,

Respondent.

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

Respondent, Danny Ray Mylar, a/k/a Danny Ray Miles, moves for leave to proceed in forma pauperis, and specifically requests that he be permitted to file a brief in opposition to the Petition for Writ of Certiorari, as well as any brief on the merits if Certiorari be granted, in typewritten form pursuant to Supreme Court Rule 39, and that only one copy of each brief be required to be filed and one copy served on opposing counsel. In support of this motion, Respondent states:

1. He is financially unable to afford the cost of printing briefs or of duplicating multiple copies of the brief, and is also unable to retain counsel.

2. He is incarcerated, unemployed, and without funds to pay legal fees or expenses.

3. His motion to proceed in forma pauperis had been granted by the United States District Court and the Court of Appeals had appointed the undersigned counsel, under the Criminal Justice Act of 1964, to represent him in this matter. A copy of the appointment is attached hereto.

Respectfully submitted,

Linda Friedman
Counsel for Respondent

CERTIFICATE OF SERVICE

I hereby certify that on July 7, 1982, one copy of the foregoing motion was deposited in the U. S. mail, first-class postage prepaid, addressed to counsel for Petitioner, as follows: Joseph G. L. Marston, III, Assistant Attorney General, Office of the Attorney General, 250 Administrative Bldg., 64 North Union Street, Montgomery, Alabama 36130. I further certify that all copies required to be served have been served.

Linda Friedman

OF COUNSEL:

BRADLEY, ARANT, ROSE & WHITE
1400 Park Place Tower
Birmingham, Alabama 35203
(205)252-4500

CJA 20 Appointment & Voucher for Counseling Services

APPOINTMENT

IN UNITED STATES ☐ MAGISTRATE ☐ DISTRICT ☒ APPEALS COURT or ☐ OTHER PANEL (Specify below)

IN THE CASE OF: DANNY RAY MYLAR, a/k/a DANNY RAY MILES

FOR: FIFTH CIRCUIT COURT OF APPEALS

BY: ATLANTA, GEORGIA

ROBERT G. BRITTON, etc., et al

LOCATION NUMBER:

PROCEEDING (Describe briefly): appeal

CHARGE/OFFENSE (Describe if applicable & check box →) ☐ Felony ☐ Misdemeanor

U.S. or other code citation ▶

1 ☒ Defendant – Adult
2 ☐ Defendant – Juvenile
3 ☐ Appellant
4 ☐ Probation Violator
5 ☐ Parole Violator
6 ☒ Habeas Petitioner
7 ☐ 2255 Petitioner
8 ☐ Material Witness
9 ☐ Other (Specify Below)

DOCKET NUMBERS
Magistrate:
District Court: CV79-A-1420-S
Court of Appeals: 81-7412

VOUCHER NUMBER: 627766

PERSON REPRESENTED (Show full name & status, & check box →)

Danny Ray Mylar

Name already appears as ☒ P1 or as ☐ D1 above

COURT ORDER

☒ APPOINTING COUNSEL
☐ RATIFYING PRIOR SERVICE
☐ EXTENDING APPOINTMENT FOR APPEAL
☐ SUBSTITUTING COUNSEL FOR:
(name of prior counsel) (date appt'd)

Because the above named "person represented" has testified under oath or has otherwise satisfied this court that he or she: (1) is financially unable to employ counsel, and (2) does not wish to waive counsel, and because the interests of justice so require, the attorney or organization printed here and below

LINDA B. FRIEDMAN

is hereby appointed to represent this person in the above designated case.

If appointment is made by a magistrate and the case subsequently proceeds to U.S. District Court, the appointment shall remain in effect until terminated or a substitute attorney is appointed.

The attorney or organization herein appointed is authorized to claim reimbursement on this form, subject to applicable law, administrative regulations, and the plan of the court.

Signature of U.S. Judge or Magistrate — Date

OR BY ORDER OF THE COURT
Linda G. Pritt (Name of Deputy) 5-27-81

		HOURS	AMOUNT
I.	COURT		
A.	ARRAIGNMENT & OR PLEA		
B.	MOTIONS & REQUESTS		
C.	TRIAL HEARINGS		
D.	SENTENCE HEARINGS		
E.	TRIAL		
F.	REVOCATION HEARINGS		
G.	APPEALS COURT		
H.	OTHER (Specify below)		
	TOTAL "IN COURT" HOURS		▶ $
II	OUT OF COURT		
A.	INTERVIEWS & CONFERENCES		
B.	OBTAINING & REVIEWING RECORDS		
C.	LEGAL RESEARCH & BRIEF WRITING		
D.	INVESTIGATIVE & OTHER WORK (Specify)		
E.	TRAVEL TIME (during normal office hours only) (1) TO & FROM COURT (round-trips under 1 hr not allowed) (2) OTHER TRAVEL TIME (Specify)		
	TOTAL "OUT OF COURT" HOURS		▶ $
	TOTAL COMPENSATION FOR "IN COURT & OUT OF COURT" TIME		▶ $

III. ITEMIZED EXPENSES (Specify, per instruction sheet)	AMT. PER ITEM
	$
TOTAL ITEMIZED EXPENSES	▶ $
TOTAL COMPENSATION & EXPENSES	▶ $
DEDUCT AMOUNTS PREVIOUSLY PAID IF APPLICABLE	
NET AMOUNT CLAIMED	▶ $

If more space is needed use additional blank sheets

CERTIFICATIONS OF ATTORNEY/PAYEE

Has compensation and/or reimbursement for work in this case been previously applied for or received? ☐ Yes ☐ No
If "Yes", how much were you paid? $
By whom were you paid?

If this is an appeal did you represent person in lower court? ☐ Yes ☐ No

SIGNATURE OF ATTORNEY/PAYEE — I SWEAR & AFFIRM THE TRUTH & CORRECTNESS OF ABOVE STATEMENTS — DATE

AMOUNT CERTIFIED/APPROVED: $

APPROVED FOR PAYMENT — SIGNATURE OF JUDGE/MAGISTRATE — DATE

SIGNATURE OF CHIEF JUDGE COURT OF APPEALS — Payment in excess of statutory limitation approved under 18 USC 3006A(d)(3) — DATE — AMT. APPROVED $

COUNSEL ☒ IS A PRIVATE ATTORNEY ☐ IS FURNISHED BY: ☐ COMMUNITY DEFENDER ORGANIZATION ☐ BAR ASSOCIATION OR LEGAL AID AGENCY

PHONE NO. (205) 252-4500

SOCIAL SECURITY NO. 264-48-4703

VOUCHER NUMBER 627766

DID DEFENDANT PAID ANY MONEY TO YOU SINCE HIS ARREST, OR TO YOUR KNOWLEDGE, TO ANYONE ELSE, IN CONNECTION WITH THE OFFENSE FOR WHICH YOU WERE APPOINTED TO DEFEND HIM? IF SO, GIVE DETAILS.

ATTORNEY'S ORGANIZATION'S ADDRESS:

Ms. Linda B. Friedman
1500 Brown Marx Building
Birmingham, AL

ZIP CODE 35203

AT TIME OF APPOINTMENT PLEASE TYPE OR PRINT CLEARLY THE NAME OF ATTORNEY OR ORGANIZATION (PAYEE) AND THE ADDRESS TO WHICH CHECK SHOULD BE MAILED